FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 852

[illegible] B. BEARD and HELEN B. BEARD,
Petitioners,

vs.

[illegible] UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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JOHN B. BEARD and HELEN B. BEARD,
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vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Ninth Circuit entered May 26, 1958, reversing the judgment of the United States District Court for the Northern District of California, Northern Division.

entered March 25, 1957. A petition for rehearing was denied July 8, 1958.[1]

OPINIONS BELOW.

The District Court wrote no opinion. The District Court's findings of fact and conclusions of law (R. 44-71)[2] are not officially reported. The opinion of the Court of Appeals, which has not yet been officially reported appears in Appendix A, infra, pp. v-xv.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The date of the judgment sought to be reviewed and the date of its entry are May 26, 1958.

The date of the order denying a petition for rehearing and rehearing en banc was July 8, 1958. No order granting an extension of time within which to petition for certiorari was made.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is the United States Code, Title 28, Section 1254(1).

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[1]The judgment of the Court of Appeals, the order denying rehearing in the Court of Appeals, and the judgment and amended judgment of the District Court, are printed in Appendix A, infra, pp. xvi, xvii, i-ii, iii-iv.

[2]Numerical references in parentheses preceded by letter "R" refer to the certified record of the Court of Appeals presented with this petition.

QUESTIONS PRESENTED FOR REVIEW.

1. Where the District Court made findings of fact, based on substantial evidence, that petitioners were not dealers in real estate, were not engaged in the real estate business, and did not hold certain real properties for sale to customers in the ordinary course of their trade or business within the meaning of Section 117(a)(1), Internal Revenue Code of 1939, (now Section 1221, Internal Revenue Code, 1954), did the Court of Appeals in reversing the District Court on these questions of fact and in determining as a fact, contrary to the findings of the District Court, that petitioners were dealers in real estate, were engaged in the real estate business and did hold these real properties primarily for sale to customers in the ordinary course of their trade or business, exceed the authority conferred upon it by the mandate of Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., that "findings of fact shall not be set aside unless clearly erroneous"?

2. Is land, purchased by taxpayers as an investment, which is subdivided and sold off in residential lots as the most advantageous manner for taxpayers to realize on their investment, excluded from the definition of capital assets as that term is defined by Section 117(a)(1), Internal Revenue Code, 1939, (now Section 1221, I.R.C., 1954), as a matter of law, where the taxpayers are employed fulltime in a business

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Rule 52(a), F.R.C.P., printed in Appendix B, infra, p. xviii.

unrelated to their real estate holdings and the work of improving, subdividing and selling is conducted principally and primarily through real estate brokers without supervision or control by taxpayers?

3. Does land, purchased by taxpayers as an investment, which is subdivided and sold off in residential lots as the most advantageous manner for taxpayers to realize on their investment, constitute property held by the taxpayers primarily for sale to customers in the ordinary course of their trade or business, as a matter of law, within the meaning of that expression as set forth in Section 117(a)(1), Internal Revenue Code, 1939, (now Section 1221, Internal Revenue Code, 1954)?

4. Are taxpayers who purchase and hold land as an investment, causing it to be improved, subdivided and sold off in residential lots primarily and principally through real estate brokers without supervision or control, and who are engaged in fulltime employment unrelated to their real estate activities, engaged in the real estate business as a matter of law?

5. Is the question of whether or not real property acquired as an investment and subdivided and sold in subdivision lots constitutes property held primarily for sale to customers in the ordinary course of the taxpayers' trade or business within the meaning of that expression as set forth in Section 117(a)(1), Internal Revenue Code of 1939, (now Section 1221, Internal Revenue Code, 1954) a question of fact or a question of law?

STATUTES INVOLVED.

The pertinent provisions of the United States Internal Revenue Code of 1939, adopted by act of February 10, 1939, Ch. 2, 53 Stat. 1-504, applicable to this proceeding are:

Section 117. Capital Gains and Losses.

(a) *Definitions*—As used in this chapter—

(1) [As amended by Section 151(a), Revenue Act of 1942, c. 619, 56 Stat. 798.] *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(f) * * * or real property used in the trade or business of the taxpayer;

26 U.S.C. 1952 Ed., Section 117.

(Now Title 26, U.S.C.A., Section 1221, Internal Revenue Code, 1954.)

Also involved in this proceeding is the application of the so-called "clearly erroneous rule" set forth in Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., in respect to the power of Courts of Appeals to set aside findings of fact made by the District Courts. Rule 52(a) is printed in Appendix B, infra, p. xviii.

STATEMENT OF THE CASE.

The basis for federal jurisdiction in the court of first instance.

This case involves petitioners' claims for refund of federal income taxes in the amount of $34,024.85 plus interest for the calendar years 1946 through 1950 inclusive. (R. 74-75.) Petitioners, husband and wife, filed separate returns for the years 1946 and 1947 (R. 33, 35) and joint returns for the years 1948, 1949 and 1950. (R. 37, 39, 41.) In their returns for the year 1946 petitioners reported profits from the sales of subdivision lots as ordinary income (R. 33, 35); this was done under the advice of their accountant. (R. 181-184.) For the years 1947, 1948, 1949 and 1950 petitioners reported their profits from the sale of subdivision lots as capital gain (R. 35-42); this was done under the advice of their attorney. (R. 181-184.) For the years 1947, 1948, 1949 and 1950 the Commissioner of Internal Revenue assessed a deficiency against the taxpayers for the difference between the income tax on these profits at capital gain rates and the income tax at ordinary income tax rates (R. 35-42); petitioners paid these deficiencies and duly filed claims for refund for each of the years in question in an amount equal to the difference between the income tax on these profits from the sale of subdivision lots at capital gain rates and the income tax at ordinary income rates. (R. 33-43.) Petitioners filed two suits in the United States District Court for the Northern District of California, Northern Division, to recover the amount of these claims for refund. The first action was filed August 18, 1953, to recover the amount

of the claimed overpayment for the year 1946, being Civil Action No. 6942. (R. 3-9.). The second suit to recover assessed deficiencies paid for the years 1947, 1948, 1949 and 1950 was commenced July 28, 1955. (R. 9-22.) The two actions so brought were consolidated for trial by stipulation filed January 5, 1956. (R. 287, 290.)

In the case of each asserted overpayment and each paid deficiency, suit for refund was commenced within the time provided by Section 3772 of the Internal Revenue Code of 1939 or Section 6532 of the Internal Revenue Code of 1954. Jurisdiction was conferred on the District Court by Title 28, United States Code, Section 1346(a)(1) and Section 1340.

On March 25, 1957, judgment was entered for petitioners in the claimed amount of $36,519.29 plus interest. (R. 71-72.)

On April 3, 1957, timely notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed by the government. (R. 73.) Pursuant to stipulated recomputation filed May 6, 1957 (R. 74-75), the amount of the judgment for petitioners was reduced to $34,024.85 plus interest. (R. 75-76.) Accordingly, the amount of federal income tax as here involved is $34,024.85 plus interest. Jurisdiction was conferred on the Court of Appeals by 28 U.S.C., Section 1291.

The facts material to the consideration of the questions presented

The lands in question were purchased by petitioners between 1937 and 1946 as an investment of moneys

saved from their community earnings with the thought of realizing on their investment in whatever manner might prove most advantageous, whether to farm, to sell as farm land, or to subdivide and sell as residential lots. (R. 94, 99-101, 211, 213.) These lands were in a farming district, were being operated as farms when purchased, and for the most part were farmed for varying periods by petitioners or their tenants, in some instances up to five years. (R. 97, 98, 103, 113, 114, 115, 136, 144-145, 152, 157, 217, 218, 231-232.) Petitioners held a 50 per cent interest in most of these lands and a one-seventh interest in the Alta Vista properties; Mr. Beard's brothers and sisters owned the remaining interest in these lands. (R. 102, 114, 137, 153.) Petitioners purchased no land after 1946, in fact, they purchased none after 1941 except a two-acre strip to round out one subdivision, a two acre plot to protect another subdivision, a one-seventh interest in the Alta Vista properties and the four-acre Cartwright Ranch. (R. 172, 173, 176, 177.)

Subdivision and sale by residential lots turned out to be the most advantageous manner for petitioners to realize on their investment. Accordingly, the lands were subdivided, improved and sold off in residential lots. Some sales were made and some subdivision work done between 1938 and 1945 in two of the tracts, namely, Wilson No. 1 and Wilson No. 2, but the bulk of the sales, subdivision and improvement work were made during the tax years in question; namely, 1946 to 1950, inclusive. (R. 104, 111, 119, 152, 168, 181, 259.) During the tax years in question, 1946-1950, inclusive, petitioners personally did nothing them-

selves in respect to the sale or development of these lands, other than sign deeds. (R. 108, 120, 141, 150, 151, 160, 161, 167, 168.) During the tax years in question all subdividing improvement and selling were handled by a real estate broker, namely, Beard Land and Investment Co. under exclusive agency agreements without supervision or control by petitioners. (R. 93, 108, 109-112, 117, 121, 141-142, 147, 150-151, 158, 161, 167, 168, 191, 243, 244; plaintiffs' Exhibits 2, 3, 4 and 5.)[4]

From 1937 to 1945 (prior to the tax years in question) there was some development work and sales in two of the tracts, namely, Wilson School No. 1 and Wilson School No. 2, but all such improvement and sales during these years was handled primarily by another independent broker, namely, Hopkins, without supervision or control by petitioners (R. 104, 105, 117, 175, 176), though petitioner, John B. Beard, during these years (1937-1945) did these things himself: He had a subdivision map made and filed in 1940 for Wilson School Tract No. 2 (R. 119), a preliminary subdivision map for the Thousand Oaks Tract in 1941 (R. 152); he obtained a subdivision permit for Wilson School Tract No. 1 and No. 2 in 1940 (R. 168); and caused a total of nine houses to be constructed in Wilson School No. 1 and Wilson School No. 2 in 1940 and 1941 (R. 181), and did some preliminary improvement work in Thousand Oaks in 1941 (R.

[4]Only one of the exclusive agency agreements for one tract is printed in the transcript at page 121 but the other agreements for the other tracts follow substantially the same pattern. R. 147, 111, 112, 141, 150, 151, 160, 161, 179, 191, 243, 108, 109, 244.

152); he sold approximately twenty lots himself from 1938 to 1945 from two subdivisions, Wilson School No. 1 and Wilson School No. 2 (R. 104, 111) and two houses (R. 181), but these sales were made to friends or acquaintances who called on him and were not the result of solicitation or promotion on his part. (R. 105, 115, 116.)

From 1926 until 1953 petitioner, John B. Beard, was employed fulltime as president and general manager and director of the Modesto Refrigerating Company (R. 78, 80, 81), a firm engaged in large scale operations in the quick freezing and cold storage of fruits, vegetables and turkeys (R. 80-83) where he worked from 8:00 or 8:30 in the morning until 5:30 or 6:00 in the evening (R. 84, 85) and in addition he had overall supervision of City Ice and Fuel (R. 82), a firm engaged in conducting an ice, fuel and appliance business. (R. 84, 86.) He maintained only one office, that was at the Modesto Refrigerating Company. (R. 84-85.) He had no real estate office and had never had a real estate broker's license. (R. 168.) John Beard is one of a family group of ten brothers and sisters each of whom is a 10 per cent stockholder and director in each of seven family corporations. In 1950 these companies included: Modesto Refrigerating Company, a short line railroad, a warehousing company, an ice, fuel and appliance business, a farming concern, a large public utility water company and Beard Land and Investment Co. (hereafter L. & I.), a parent or holding company for these other organizations and it also owned some business and farm land. (R. 78, 85, 86, 87, 88, 84, 107.) L. & I. also

conducted a real estate brokerage office at a location different than its main office (R. 89, 190) managed by a Mr. Clyde Oden with two to four employees (R. 89, 108, 190); but the real estate brokerage business of L. & L. was a minor part of its operations. (R. 108, 180.)

There was one other tract, Las Palmas, purchased in 1932, referred to in the court's opinion but it is not involved in this litigation.

Petitioner, Helen Beard, has at all times been engaged as a housewife and did not take an active part in any of these transactions nor participate in the affairs of any of these organizations.

All these properties were held by petitioners for more than six months.

On the facts thus summarized the District Court in substance made these essential findings:

That petitioners were not dealers in real estate (R. 46);

That petitioners were not engaged in the real estate business (R. 46);

That from 1926 until after 1950 petitioner John Beard was continuously employed fulltime as manager of Modesto Refrigerating Company and petitioner Helen B. Beard was occupied as a housewife (R. 46-47);

That petitioners did not hold these lands primarily for sale to customers in the ordinary course of their trade or business (R. 47);

That these lands were the community property of petitioners and were acquired and held by

petitioners primarily and principally as an investment and not for the purposes stated in any of the exclusions or exceptions set forth in Section 117(a)(1), Internal Revenue Code of 1939 (R. 47);

That all these lands constituted capital assets held and owned by taxpayers for more than six months prior to sale and that the profits from the sales of these lands constituted long term capital gains within the meaning of Section 117, Internal Revenue Code, 1939, so that only 50 per cent of such profits should be recognized for federal income tax purposes (R. 48);

That the sales of said parcels of real property were not sales in the ordinary course of petitioners' business (R. 49).

The testimony on which these facts are based is substantially undisputed and counsel for the government at the trial in the District Court commended petitioner, John B. Beard, for being a very fair and unusually frank witness who did not try to deceive or cover up or gloss any of the facts.[5]

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[5]See excerpt from reporter's transcript set forth in Appendix C, infra, p. xvii. Not printed as part of the record on appeal to the Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Court of Appeals was confronted solely with a question of fact, namely, whether or not certain real property owned by petitioners was held by them primarily for sale to customers in the ordinary course of their trade or business. That this is so is acknowledged by the Court of Appeals in its opinion. In reversing the District Court we firmly believe and respectfully state that the Court of Appeals so far exceeded the power conferred upon it by Rule 52(a), F.R.C.P., supra, to set aside findings of fact, and went so far beyond the power of a Court of Appeals to review questions of fact as prescribed by this court in other decisions, that it so far invaded the fact finding functions of a trial court, and that its judgment is therefore so obviously and injuriously erroneous, as to constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Whether or not a taxpayer is engaged in a particular trade or business is a question of fact to be determined from all the facts and circumstances by the trial court (*Higgins v. Commissioner*, 312 U.S. 212, 61 S.Ct. 475; *United States v. Pyne*, 313 U.S. 127; 61 S.Ct. 893, *City Bank Farmers Trust Co. v. Helvering*, 313 U.S. 121, 61 S.Ct. 896); and no

matter how large the estate or how continuous or extended the work may be, such facts are not sufficient as a matter of law to constitute the carrying on of a trade or business (*Higgins v. Commissioner*, supra). Under Rule 52(a), F.R.C.P., findings of fact made by the District Court cannot be set aside by the Court of Appeals unless clearly erroneous. This court has heretofore laid down some rather well defined limits beyond which an Appellate Court cannot go in setting aside findings of fact and certain limits in the application of the "clearly erroneous rule" under Rule 52(a), F.R.C.P., supra. A reviewing court cannot weigh the evidence or substitute its judgment for that of the trial court nor consider and weigh the evidence as upon a trial de novo (*United States v. Yellow Cab Co.*, 338 U.S. 338, 342; 70 S.Ct. 177, 179). A choice between two permissible views of the evidence is not clearly erroneous within the meaning of Rule 52(a) (*United States v. Yellow Cab Co.*, supra; *United States v. National Association of Real Estate Boards*, 70 S.Ct. 711, 339 U.S. 485). Findings of fact are not clearly erroneous if supported by substantial evidence (*McAllister v. U. S.*, 348 U.S. 19, 75 S.Ct. 6). Findings of fact cannot be set aside by the reviewing court if supported by substantial evidence (*C.I.R. v. Scottish American Investment Co.*, 65 S.Ct. 169, 323 U.S. 119). A trial court is entitled to draw whatever inferences or conclusions from the evidence it deems reasonable (*Bochm v. Commissioner*, 326 U.S. 287, 293; 66 S.Ct. 120, 124). Nor are findings of fact clearly erroneous if the trial court made a choice between two permissible views of

the evidence even though the Appellate Court may have come to a contrary conclusion (*United States v. Yellow Cab Co.*, supra; *United States v. National Association of Real Estate Boards*, supra).

In the instant case we sincerely believe that the Court of Appeals substituted its judgment for that of the trial court, drew independent inferences of its own contrary to those of the District Judge, made an independent review of the evidence as upon a trial de novo and made an independent determination of the facts, rather than viewing the evidence from the standpoint of ascertaining whether or not there was substantial evidence to support the District Court's findings and judgment. Certainly the evidence demonstrates, or at least supports as one reasonable inference, that these properties were purchased and held as an investment (R. 94, 99-101, 211, 213); that petitioners were liquidating their investment in these properties (R. 170-173, 176, 177, 233-237); that all sales and improvement work were made substantially through real estate brokers without supervision or control by the petitioners (R. 93, 104, 105, 108, 109-112, 117, 121, 141-142, 147, 150-151, 158, 161, 167, 168, 175, 176, 191, 243, 244; plaintiffs' Exhibits 2, 3, 4 and 5); that petitioner John Beard was employed fulltime in an unrelated occupation (R. 78, 80, 85); and that petitioners were not engaged in the real estate business. Clearly the evidence supports as at least one reasonable view the finding that these properties were not held primarily for sale to customers in the ordinary course of taxpayers' trade or business. Finally, find-

ings are not clearly erroneous unless the Court of Appeals is left with a *definite and firm conviction* that a mistake has been made. (*United States v. United States Gypsum*, 333 U.S. 364, 68 S.Ct. 525.) The Court of Appeals was not left with a definite and firm conviction that a mistake had been made for in its opinion it states:

> "We *think* the trial court was clearly in error and that a mistake has been made" (emphasis supplied.)

and to "think" is not to have a "definite and firm conviction". The court's opinion gives no ascertainable reason for setting aside the District Court's findings of fact.

For the reasons given above we believe that the Court of Appeals has so far exceeded its power to set aside findings of fact as to constitute a departure from the accepted and usual course of judicial proceedings calling for an exercise of this court's power of supervision. Further, we submit that the decision of the Court of Appeals is in conflict with the decisions of this court set forth above in respect to the Appellate Court's power to set aside findings of fact.

II.

THE CONFLICT BETWEEN DECISIONS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT AND DECISIONS OF OTHER COURTS OF APPEALS.

There is a conflict in the decisions of the United States Courts of Appeals in according taxpayers capi-

tal gain treatment on profits derived from the sale of subdivision lots under Section 117, Internal Revenue Code, 1939. In each case the issue is whether or not subdivision lots come within the definition of the exclusion from capital assets referred to in Section 117(a)(1), Internal Revenue Code, 1939 (now Section 1221, Internal Revenue Code, 1954) as "property held primarily for sale to customers in the ordinary course of his (taxpayers') trade or business", which is a question of fact as acknowledged by the Court of Appeals in its opinion in the instant case. (Appendix A, infra, p. v). The conflict lies in the application of various tests or guides in resolving this question of fact. That this is true is acknowledged by the Court of Appeals in this case in its opinion (Appendix A, infra, p. v) where it states:

> "Cases of this character present difficulties because there is no agreement among the courts as to what primary element in the transaction determines its character."

For example, in the Fifth Circuit, under the decisions in *Falks v. Crawford*, 5 Cir., 1947, 161 F. 2d 315, and *Smith v. Dunn*, 5 Cir., 1955, 224 F. 2d 353, taxpayers selling subdivision lots through real estate brokers with a minimum or no supervision or control are accorded capital gain treatment on their net profits because the selling and improvement activities are treated as the business of the broker and not the taxpayer. Likewise in the Sixth Circuit, *Pope v. Commissioner*, 6 Cir., 1935, 77 F. 2d 599; the Second Circuit, *Phipps v. Commissioner*, 2 Cir., 1931, 54 F.

2d 469; and the Eighth Circuit, *Dillon v. Commissioner*, 8 Cir., 1954, 213 F. 2d 218 (houses). Also, this distinction has been recognized in decisions from other federal courts.[6] On the other hand, the Court of Appeals for the Ninth Circuit by an unbroken line of decisions has uniformly rejected this distinction, and in all cases coming before it on this question, where the sale and improvement of the subdivision property was made through a real estate broker, the Court of Appeals for the Ninth Circuit has always denied the taxpayer the benefit of capital gain treatment on his profits from the sale of subdivision lots by uniformly imputing the selling and improvement activities of the broker to the owner-taxpayer thus determining that the taxpayer is engaged in the real estate business (*Richards v. Commissioner*, 9 Cir., 1936, 81 F. 2d 369; *Welch v. Solomon*, 9 Cir., 1958, 99 F. 2d 41; *Achong v. Commissioner*, 9 Cir., 1957, 246 F. 2d 445; and now the instant case, *Beard v. the United States*; see also *Commissioner v. Boeing*, 9 Cir., 1939, 106 F. 2d 305, involving the sale of logs). In the instant case it is clear that sales and improvement activities were conducted principally and primarily through real estate brokers without super-

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[6] *Powers v. United States*, U.S.D.C., So. Dist., Ill., Civil No. 2282, decided 6-11-58 (1958-2, U.S.T.C. Par. 9597); *Port Woolworth Corporation v. U. S. A.*, U.S.D.C., Seventh Dist., Ga., Savannah Div., Civil No. 919, decided 3-10-58 (1958-1, U.S.T.C. Par. 9446); *Gordon v. The United States, United States Court of Claims*, No. 461-55, decided March 5, 1958 (1958-1, U.S.T.C. Par. 9335); *Boomhower v. United States*, 74 F. Supp. 997, U. S. District Court, Northern District of Iowa, 1947; *Schumacher v. U. S.*, U.S.D.C., So. Dist. Texas, Houston Div., Civil No. 10547, decided 3-18-58 (1958-1 U.S.T.C., Par. 9408).

vision or control by the taxpayers, yet the Court of Appeals in its opinion did not even consider this distinction. The government counsel in arguing his case before the District Court in the instant case acknowledged this conflict in stating:

> "The Ninth Circuit, contrary to what *Smith v. Dunn* says, indicates quite clearly that sales through a broker make the business nevertheless that of the taxpayer."[1]

In *Curtis Company v. Commissioner*, 3 Cir., 1956, 232 F. 2d 167, involving the sale of 1,000 housing units in a three-year period, the Commissioner of Internal Revenue acknowledged that if sales had been made through an independent broker the taxpayer would be entitled to capital gain benefits. Thus in the Fifth Circuit (*Smith v. Dunn*, supra, and *Fglis v. Crawford*, supra), taxpayers selling subdivision lots through a broker are accorded capital gain treatment on their profits; likewise the Second Circuit (*Phipps v. Commissioner*, supra); the Sixth Circuit (*Pope v. Commissioner*, supra); and the Eighth Circuit (*Dillon v. Commissioner*, supra); but not so in the Ninth Circuit (*Welch v. Solomon*, supra, *Richards v. Commissioner*, supra, *Achong v. Commissioner*, supra, and the instant case, *Beard v. the United States*). We believe that *Smith v. Dunn*, supra, is a leading case in the United States Courts of Appeals on this question and lays down some correct prin-

[1] See Reporter's transcript of discussion between court and counsel after close of testimony printed in Appendix C, infra, p. xxv. Not included in the printed transcript of the record sent up from the Court of Appeals.

ciples or tests as a guide to decision in cases of this nature. The principal difference between *Smith v. Dunn,* supra, and the instant case is in respect to the manner in which the property was acquired. In *Smith v. Dunn,* supra, the taxpayer inherited the property while in the instant case it was purchased. This would hardly seem necessarily relevant and would certainly not be a necessary requirement in determining the character of the property when acquired; in either case it was a capital asset when acquired, in one instance by inheritance and in the other by the investment of savings.

* * *

There is conflict in another area between the decisions of the Court of Appeals for the Ninth Circuit (including the decision in the instant case) and decisions from Courts of Appeals in other circuits in determining whether or not real property is held primarily for sale to customers in the ordinary course of a trade or business. This conflict lies in the application of the so called "liquidation test" in determining whether or not a taxpayer holds his properties primarily for sale to customers in the ordinary course of his business. In the following decisions the Courts of Appeals in the Fifth Circuit, Eighth Circuit, Seventh Circuit, and Third Circuit have held that where taxpayers were liquidating their properties, they were not held primarily for sale to customers in the ordinary course of taxpayers' trade or business and accorded the taxpayers capital gain treatment on the profits from the sale of their properties (*Smith v. Dunn,* 5 Cir., 1955, 224 F. 2d 353, *Goldberg v.*

Commissioner, 5 Cir., 1955, 223 F. 2d 709, *Greenspon v. Commissioner*, 8 Cir., 1956, 229 F. 2d 947, *Dillon v. Commissioner*, 8 Cir., 1954, 213 F. 2d 218, *Chandler v. Commissioner*, 7 Cir., 1955, 226 F. 2d 403, and *Curtis Company v. Commissioner*, 3 Cir., 1956, 232 F. 2d 167). On the other hand, the Court of Appeals for the Ninth Circuit, squarely in conflict with these decisions, has consistently and expressly rejected the liquidation test by an unbroken line of decisions and has uniformly denied the taxpayer the benefit of capital gain treatments on his profits when liquidating his investment properties (*Ehrman v. Commissioner*, 9 Cir., 1941, 120 F. 2d 607[8], *Richards v. Commissioner*, 9 Cir., 1936, 81 F. 2d 369, *Commissioner v. Boeing*, 9 Cir., 1939, 106 F. 2d 305, *Achong v. Commissioner*, 9 Cir., 1957, 246 F. 2d 445, *Palos Verdes Corporation v. U. S.*, 9 Cir., 1952, 201 F. 2d 256, and now the instant case, *Beard v. the United States*.) In the instant case it is clear that taxpayers were liquidating their investment in real properties for they purchased none after commencing sales in 1946 and in fact purchased very little property after 1941.

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[7] In *Curtis Company v. Commissioner*, 3 Cir., (quoting from *Goldberg v. Commissioner*, 5 Cir., 223 F. 2d 709), the court said: "The test as to whether the capital gains benefits apply in such events is, at bottom, whether the purpose of these sales is primarily making money by carrying on a substantial part of the activities of a person engaged in the business of selling houses or to dispose of or liquidate the rental properties. If the latter is the case the owner obtains capital gains benefits."

[8] In *Ehrman v. Commissioner*, the Ninth Circuit Court of Appeals said: "This court has heretofore in *Richards v. Commissioner*, 9 Cir., 81 F. 2d 369, 106 A.L.R. 249, and in *Commissioner v. Boeing*, 9 Cir., 106 F. 2d 305, rejected the liquidation test in determining whether or not a taxpayer is engaged in a trade or business."

(R. 170-173, 176, 177, 233-237.) The court in the instant case did not in its opinion even consider the liquidation test. (Appendix A, infra, pp. v-xv.) That there is a conflict on this question of liquidation between the Court of Appeals for the Ninth Circuit and other Courts of Appeals is acknowledged by the Court of Appeals for the Eighth Circuit in *Greenspon v. Commissioner*, supra;[10] the conflict

[10]In *Greenspon v. Commissioner*, the court said: "There are many reported cases which discuss the question of whether liquidation is a business. In general, the courts take the position that each case must be determined upon its particular facts, and that no definite formula for deciding cases of this type can be prescribed. Among the cases holding that the method of liquidation used in the particular case would not deprive the taxpayer of the right to capital gains treatment are: *Dillon v. Commissioner*, 7 Cir., 213 F. 2d 218; *Chandler v. United States*, 7 Cir., 226 F. 2d 403; *Smith v. Dunn*, supra; *Goldberg v. Commissioner*, 6 Cir., 223 F. 2d 709; *McGah v. Commissioner*, 9 Cir., 210 F. 2d 769; *Victory Housing No. 2 v. Commissioner*, 10 Cir., 205 F. 2d 371; *Three States Lumber Co. v. Commissioner*, 7 Cir., 158 F. 2d 61; *United States v. Robinson*, 5 Cir., 129 F. 2d 297; *Garrett v. United States*, 128 Ct. Cl. 100, 120 F. Supp. 133; *Boatmen's v. United States*, D.C.N.D. Iowa, 74 F. Supp. 997; *In re Estate of Jacques Ferber*, 22 T.C. 261. There are also cases reaching the contrary conclusion, such as *Richards v. Commissioner*, 9 Cir., 81 F. 2d 369, and *Ehrman v. Commissioner*, 9 Cir., 120 F. 2d 467, relied upon by the Tax Court, and cases cited by the Commissioner, among them, *Palos Verdes Corp. v. United States*, 9 Cir., 201 F. 2d 256; *Rollingwood Corp. v. Commissioner*, 9 Cir., 196 F. 2d 263; *Brown v. Commissioner*, 5 Cir., 143 F. 2d 468, *Shea v. Commissioner*, 5 Cir., 97 F. 2d 891.

"The apparent conflict in the lines of cases hereinabove [illegible] can perhaps in some instances be explained on the basis of factual differences. There also appear to be differences in the law applied. It would be impossible to reconcile all the conflicting decisions and, since the factual situation presented by the particular case is the important and controlling factor, little would be accomplished by discussing the many cases in detail. On the one hand, the cases denying the capital gains treatment appear to decide on the basis of finding a few similarities between the way in which the liquidation was conducted and the manner in which business is ordinarily conducted. Apparently, such method was used by the Tax Court. On the other hand, it would seem that in [illegible]

is also acknowledged by the Court of Appeals for the Ninth Circuit in *Pool v. Commissioner*, 9 Cir., 1957, 251 F. 2d 233.[11] At the trial of the case in the District Court the trial judge and counsel for the government recognized that the Court of Appeals for the Ninth Circuit had rejected the liquidation test and that there was a conflict on this point (R. 237); and at page 30 of its brief to the Court of Appeals in the instant case the government acknowledged that the Court of Appeals for the Ninth Circuit did not recognize the liquidation test. Thus in the Fifth Circuit (*Smith v. Dunn*, supra, *Goldberg v. Commissioner*, supra),[9] in the Eighth Circuit (*Dillon v. Commissioner*, supra, *Greenspon v. Commissioner*, supra), the Seventh Circuit (*Chandler v. the United States*, supra) and the Third Circuit (*Curtis Company v. Commissioner*, supra) the liquidation test is deemed important and where the taxpayer is liquidating his investment in his proper

the cases permitting capital gains treatment reached that result after a more thorough and complete survey of the entire factual situation."

[11] In *Pool v. Commissioner*, 9 Cir., 251 F. 2d 233, at note 6, page 236, the court said: ". . . The line of cases in which this Court has refused to consider liquidation, either directly or through agents, as determinative of the matter, is unbroken: *Richards v. Commissioner*, 9 Cir., 1936, 81 F. 2d 369, 372-373; *C. I. R. v. Boeing*, 9 Cir., 1939, 106 F. 2d 305, 309; *Ehrman v. Commissioner*, 9 Cir., 1941, 120 F. 2d 607, 610; *Kellinqwood Corp. v. Commissioner*, 9 Cir., 1951, 190 F. 2d 263, 266; *Cohn v. Commissioner*, 9 Cir., 1955, 226 F. 2d 22, 24; *Achong v. Commissioner*, 9 Cir., 1957, 246 F. 2d 445, 447. In the light of this, the seemingly contrary conclusion reached by the Court of Appeals for the Third Circuit in *Curtis Company v. Commissioner*, 1956, 232 F. 2d 167, loses significance." The strong dissent by Circuit Judge McLaughlin stresses the fact that the majority opinion is contrary to the decisions of this court. . . ."

ties it is considered a sale of capital assets as that term is defined by Section 117(a)(1), I.R.C., 1939 (now Section 1221, I.R.C., 1954) and not sales in the course of a taxpayers' trade or business, and the profits from these sales are accorded capital gain treatment. But not so in the Court of Appeals for the Ninth Circuit, for that court does not even consider the liquidation test and taxpayers residing in the Ninth Circuit who liquidate their investment in their properties are denied the benefit of capital gain treatment on their profits (*Ehrman v. Commissioner*, supra, *Commissioner v. Boeing*, supra, *Richards v. Commissioner*, supra, *Achong v. Commissioner*, supra, and now the instant case, *Beard v. United States*.

* * *

Further, there is conflict between the Court of Appeals for the Ninth Circuit and other Courts of Appeals in regard to the application of the so-called "frequency and continuity" test to situations of this kind. The Court of Appeals for the Ninth Circuit lays great stress on the frequency and continuity test and denies taxpayers capital gain treatment on their profits from sales of property where the sales are frequent and continuous (*Boeing v. Commissioner*, 9 Cir., 1939, 106 F. 2d 305);[12] and seemingly in the instant case the Court of Appeals must have considered the frequency and continuity of the sales as con-

[12] In *Commissioner v. Boeing*, the court said at page 309: "From the cases it would appear that the facts necessary to create the status of one engaged in a 'trade or business' revolved largely around the frequency or continuity of the transactions claimed to result in a 'business' status."

trolling. On the other hand, in the Fifth Circuit the Court of Appeals did not deny taxpayer the benefit of capital gain rates on his profits simply because the sales are frequent, continuous and substantial (*Goldberg v. Commissioner*, 5 Cir., 1955, 223 F. 2d 709);[13] likewise in the Seventh Circuit in *Chandler v. U. S.*, 7 Cir., 1955, 226 F. 2d 403, taxpayers were accorded the benefit of capital gain rates on profits from the sale of parcels of land despite the fact there were 536 separate sales transactions in an eight-year period with gross sales exceeding $5,000,000; likewise in the Third Circuit in *Curtis Company v. Commissiner*, 3 Cir., 1956, 232 F. 2d 167, the taxpayers were accorded capital gain treatment on profits from the sale of housing units despite the fact that 858 units were sold in one year with a gross profit of $2,829,742.81. That the Court of Appeals for the Ninth Circuit considers the frequency and continuity of sales as controlling and is not in accord with other Courts of Appeals on this point was acknowledged by counsel for the government at the trial of the instant case before the District Court when he stated to the court:

> "They (Ninth Circuit Court of Appeals) seem to lean almost exclusively on the fact that merely from a picture of the nature of the activities in connection with the sale of the property itself, judge it almost exclusively from the fre-

[13] In *Goldberg v. Commissioner*, 5 Cir., the court stated at page 712: "The courts do not deny capital gain benefits simply because a large number of sales are made in a short period; for if the owner has a large number of houses on a sellers' market, it is quite possible that he may sell them continuously without any sales promotion or solicitation."

quency and continuity of those sales, and they will not let the taxpayer divorce himself from those agents that he hires to do his work."[14]

* * *

Also, there is conflict between the decisions of the Court of Appeals for the Ninth Circuit and other Courts of Appeals as to whether or not the issue in these cases, namely, whether or not real property is held primarily for sale to customers in the ordinary course of a taxpayer's trade or business, is a question of fact subject to review only within the limits of Rule 52(a), F.R.C.P., supra, or is a legal conclusion subject to review free from the restraining impact of the "clearly erroneous" rule under Rule 52(a), F.R.C.P. It would seem that whether or not real properties are held for sale to customers in the course of taxpayers' trade or business would require a determination of whether or not a taxpayer is engaged in the real estate business and certainly whether or not a taxpayer is engaged in a particular business is a question of fact (*Higgins v. Commissioner*, 312 U.S. 212, 61 S.Ct. 475, 1941; *United States v. Pyne*, 61 S.Ct. 893, 313 U.S. 127, 1941; *City Bank Farmers Trust v. Helvering*, 313 U.S. 121, 61 S. Ct. 896, 1941); and the Court of Appeals for the Ninth Circuit has, correctly we believe, treated this question as one of fact subject to review only within the limits of the clearly erroneous rule se-

[14]Taken from reporter's transcript of discussion between court and counsel after close of testimony which is printed in Appendix C, infra, p. xxvi, but is not included in the printed transcript of the record sent up from the Court of Appeals.

forth in Rule 52(a), F.R.C.P., supra (*Achong v. Commissioner*, supra, *Pool v. Commissioner*, supra, and the instant case of *Beard v. United States*). However, in the Fifth Circuit in *Galena Oaks Corporation v. Scofield*, 218 F. 2d 217, and *Goldberg v. Commissioner*, supra,[15] treat this question more as a legal inference or conclusion of law subject to review free from the restraining impact of the so-called clearly erroneous rule; likewise, the Seventh Circuit in *Chandler v. United States*, 226 F. 2d 403 where the court said at page 405:

> "We are empowered to overturn his, (District Judge's) decision since the ultimate finding on which the judgment appealed rests is a conclusion of law, or a mixed one."

In the instant case the government, at page 28 of its brief to the Court of Appeals, urged that the finding that real properties were not held primarily for sale to customers in the ordinary course of taxpayers' trade or business, was a conclusion of law, but in *Galena Oaks Corporation v. Scofield*, 5 Cir., 1954, 218 F. 2d 217, on this very same question, the government urged that the question was one of ultimate fact and should be affirmed unless clearly erroneous; in the

[15] In treating a finding on this question as subject to review free from the restraining impact of the clearly erroneous rule the Court of Appeals for the Fifth Circuit, in *Goldberg v. Commissioner*, supra, at page 711, said, in quoting from *Galena Oaks Corp. v. Scofield*, supra: "Insofar • • • as the so called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so called "clearly erroneous" rule'. (Citing *Lehmann v. Acheson*, 3 Cir., 206 F. 2d 592, 594.) • • •"

Galena Oaks case the government prevailed in the lower court and thus were contending that the question was one of fact and should not be reversed unless clearly erroneous, while in the instant case where they lost in the District Court they were urging it was a conclusion of law and in substance subject to review free from the restraining impact of the clearly erroneous rule.

Finally, there is a conflict between the decisions of the Court of Appeals for the Ninth Circuit on this question and Courts of Appeals in other circuits in that the Court of Appeals for the Ninth Circuit on each occasion that it has decided this question has held that the sale of subdivision lots constituted the sale of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" and thus the profits were not gains from the sale of capital assets as that term is defined by Section 117(a)(1), I.R.C., 1939 (Sec. 1221, I.R.C. 1954), and denied the taxpayer the benefit of capital gain treatment on his profits. The Court of Appeals for the Ninth Circuit has decided this question on ten occasions so far as our research discloses.[16] In eight of

[16]The only decisions in the Court of Appeals for the Ninth Circuit on this question which we can find are: *Achong v. Commissioner*, 1957, 246 F. 2d 445 (affirmed as a question of fact for the government); *Pool v. Commissioner*, 1957, 251 F. 2d 233 (affirmed as a question of fact for the goverment); *Bistline v. U. S. A.*, decided 6-13-58, No. 15607 (affirmed as a question of fact for the government); *Bistline v. U. S. A.*, decided 5-13-58, No. 15716 (affirmed as a question of fact for the government); *Shearer v. Smith*, 1955, 221 F. 2d 478 (affirmed as a question of fact for the government); *Palos Verdes Corporation v. United States*, 1952, 201 F. 2d 256. (affirmed as a question of fact for the government); *Richards v. Commissioner*, 1936, 81 F. 2d 369 (affirmed as

these decisions the government prevailed in the District Court or the Tax Court and in each of these instances the Court of Appeals affirmed as a question of fact (see citations, Footnote 16, pp. 28-29), and in the other two cases cited in the footnote, namely *Welch v. Solomon* and the instant case of *Beard v. United States*, the taxpayer prevailed in the lower court and the Ninth Circuit Court of Appeals reversed in favor of the government. Thus the Court of Appeals for the Ninth Circuit by an unbroken line of decisions has uniformly denied taxpayers the benefit of capital gain treatment on profits from the sale of subdivision lots. On the other hand there are a number of decisions from the Courts of Appeals in other circuits holding that the sale of subdivision lots does not constitute the sale of "property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayers' trade or business" within the meaning of that expression as set forth in Section 117(a)(1), I.R.C., 1939, supra (now Sec. 1221, I.R.C., 1954), and thus allowing taxpayers the benefit of capital gain treatment on their profits from the sale of subdivision lots.[17] Thus it is clear that taxpayers in the Ninth

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a question of fact for the government); *Welch v. Solomon*, 1938, 99 F. 2d 41 (for the taxpayer in the District Court, reversed in favor of the government); and the instant case *Beard v. U. S.*, decided May 26, 1958, No. 15560 (for the taxpayer in the District Court, reversed in favor of the government).

[17]Decisions in the Fifth Circuit allowing capital gain treatment: *Smith v. Dunn*, 1955, 224 F. 2d 353; *Fahs v. Crawford*, 1947, 161 F. 2d 315; *Ross v. Commissioner*, 1955, 227 F. 2d 265; (see also *Dunlap v. Oldham Lumber Co.*, 1950, 178 F. 2d 781). The Second Circuit: *Phipps v. Commissioner*, 1931, 54 F. 2d 469. The Fourth Circuit: *Camp v. Murray*, 1955, 226 F. 2d 931; *McNeil v. Commissioner*, 251 F. 2d 863, 1958 (taxpayer incurred

Circuit are not allowed capital gain treatment on profits realized from the sale of subdivision lots under decisions of the Court of Appeals for the Ninth Circuit to date, while taxpayers in other circuits, particularly the Fifth Circuit, are being allowed capital gain treatment on profits from the sale of subdivision lots. While no two cases are alike on their facts, which would be practically impossible in the nature of things, nevertheless, it would seem incredible that all the cases in the Ninth Circuit on this subject could be so different on their facts as to be fairly distinguishable on principle from cases in other circuits allowing taxpayers capital gain treatment in this type of situation, unless the Court of Appeals for the Ninth Circuit has determined as a matter of law that the sale of subdivision lots does not consti-

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loss on sale of lots, held not sold in course of a trade or business. The Sixth Circuit: *Yunker v. Commissioner*, No. 13032, decided 5-1-58 (1958-1, U.S.T.C., Par. 9487); *Pope v. Commissioner*, 1955, 77 F. 2d 599. The Seventh Circuit: *Chandler v. U. S.*, 1955, 226 F. 2d 403 (not subdivision lots, but involved 536 sales of separate parcels of realty in a nine-year period or an average of about 59 a year, involving 290,000 acres, and gross sales of $5,000,000). The Third Circuit: *Curtis Company v. Commissioner*, 1956, 232 F. 2d 167 (not subdivision lots but involved the sale of 1090 housing units, 851 units sold in one year with a gross profit of $2,800,000). Other federal court decisions allowing capital gain treatment on gain from sale of subdivision lots: *Boomhower v. U. S.*, 74 F. Supp. 997 (D.C. N.D. Iowa 1947); *Berberovich v. Meninger, Collector*, 147 Fed. Supp. 890 (D.C. Mich. 1957); *McConkey v. United States*, 131 Ct. of Cl., 690, 1955; *Harman v. U. S.* A. (D.C., East. Dist. Va., No. 2410, 5-9-58) (1958-2, U.S.T.C., Par. 9684); *Emery v. U. S.* A. (D.C., So. Dist. Fla., Miami Div., No. 7771-M, 7-9-58); *Farley v. Commissioner*, 7 T.C. 198, 1946; *Thrift v. Commissioner*, 15 T.C. 366, 1950; *Dresser v. Commissioner*, 17 T.C. 1443, 1952; *Schumacher v. U. S.*, U.S.D.C., S. Dist. Tex., Houston Div., Civil No. 10547, decided 3-18-58 (1958-1, U.S.T.C., Par. 9408). To cite some of the decisions from other Court of Appeals and other federal courts.

tute the sale of a capital asset within the meaning of Section 117(a)(1), I.R.C., 1939 (now Section 1221, Internal Revenue Code, 1954, supra), and that is one of the questions presented above.

* * *

Clearly, from what has been said above, there is conflict in the decisions of the United States Courts of Appeals, particularly between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Fifth Circuit, on the question of whether or not the sale of subdivision lots, and the sale of real property in other forms for that matter, constitutes the sale of "property held by a taxpayer primarily for sale to customers in the ordinary course of the taxpayers' trade or business" within the meaning of that expression as set forth in Section 117(a)(1), I.R.C., 1939-(1221 I.R.C., 1954). Nor does Section 1237, Internal Revenue Code, 1954, relating to the sale of subdivision lots solve the problem for the basic question still remains whether or not the taxpayer is a dealer in real estate and whether or not the lots are held primarily for sale to customers in the ordinary course of a trade or business within the meaning of that expression as used in Section 1221, I.R.C., 1954; see U. S. Treasury Department Income Tax Regulations, Section 1.1237-1(a)(4); 26 C.F.R.—Part 1-19—Revised January 1, 1958, Section 1.1237-1(a)(4). (Printed Appendix B, infra, p. xix.) Most certainly the proper administration of this important income tax statute requires greater uniformity in its application and also attorneys are entitled to have the law settled so as to properly advise their clients.

III.

THE DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

The decision of the Court of Appeals in this case involves an important question of federal law which has not been, but should be, settled by this court. So far as our research discloses this court has never rendered a decision on the question of whether or not profits from the sale of subdivision lots constitute profits from the sale of capital assets as that term is defined by Section 117(a)(1), I.R.C., 1939, supra. (now Section 1221, I.R.C., 1954), or more basically under what circumstances subdivision lots constitute property held primarily for sale to customers in the ordinary course of a taxpayers' trade or business. As indicated above there have been numerous cases involving this question in the United States Courts of Appeals, also other federal courts, some being decided one way and some another, each case seemingly turning on its particular facts and circumstances, but without any uniform thread or theory or no consistent principle or criterion as a guide to decision in cases of this kind. This is a federal tax law and we believe it should be applied uniformly and that the statute in question is deserving of some really enlightening interpretation and some principle of uniformity that could be referred to in the future for the decision of cases such as this. This court can take judicial notice of the fact that there has been a boom in real estate subdivision activities since the end of World War II, which is continuing, and as a consequence cases in

volving the question of whether or not profits from the sale of subdivision lots constitute profits from the sale of a capital asset, have been legion and are continuing to come before the federal courts. Our research discloses that since the first of this year there have been 16 cases of this kind in the federal courts.[18] Clearly it is important for the proper administration of this federal tax statute (Section 117(a)(1), 1939,

[18] *O'Neil v. Commissioner*, United States Court of Appeals, 4 Cir., No. 7527, decided 1/11/58 (1958-1, U.S.T.C., Par. 9229); *Goldstein v. United States of America*, United States District Court, Eastern District, Washington, Northern Division, Civil Nos. 1612, 1613, decided 3/8/58 (1958-1, U.S.T.C., Par. 9365); *Port Wentworth Corporation v. U. S. A.*, United States District Court, Southern District, Georgia, Savannah Division, Civil No. 919, decided 3/10/58 (1958-1, U.S.T.C., Par. 9446); *King v. Phinney*, United States District Court, Western District, Texas, Austin Division, Civil Action No. 934, decided 2/5/58 (sale of houses) (1958-1, U.S.T.C., Par. 9486); *Kaltreider v. Commissioner*, United States Court of Appeals, 3 Cir., Nos. 12,336, 12,337, decided 5/21/58 (1958-2, U.S.T.C., Par. 9542); *Board v. United States*, U.S. Court of Appeals, 9 Cir., No. 15560, decided 5/26/58; *Powers v. the United States*, United States District Court, Southern District, Illinois, Civil No. 2282, decided 6/11/58 (1958-2, U.S.T.C., Par. 9597); *Bistline v. U. S. A.*, United States Court of Appeals, 9 Cir., No. 15607, decided 6/13/58 (1958-2, U.S.T.C., Par. 9619); *Bistline v. the United States*, United States Court of Appeals, 9 Cir., No. 15716, decided 5/13/58 (1958-2, U.S.T.C., Par. 9640); *Sapp v. United States of America*, United States District Court, Southern District, Florida, Jacksonville Division No. 3872, Civil-J, decided 6/10/58 (1958-2 U.S.T.C., Par. 9659); *Harcum v. United States*, United States District Court, East. Dist. Va., Norfolk Div., Civil No. 2440, decided 5/9/58 (1958-2, U.S.T.C., Par. 9684); *Western and Southern Life Insurance Company v. United States*, U. S. Court of Claims, No. 442-52, decided 7/17/58 (commercial and farm properties) (1958-2, U.S.T.C., Par. 9724); *Emery v. U. S. A.*, U. S. District Court, So. Dist. Fla., Miami Div., No. 7771-M, decided 7/9/58, (1958-2, U.S.T.C., Par. 9757); *Schumacher v. U. S.*, U.S.D.C., So. Dist. Tex., Houston Div., Civ. No. 10547, decided 3/18/58 (1958-1, U.S.T.C., Par. 9548); *Gordon v. U. S.*, U.S. Ct. Cl., No. 461-55, decided 3/5/58 (1958-1, U.S.T.C., Par. 9435); *Wagner v. Dudley*, U.S.T.C., West. Dist. Pa., Nos. 15800, 15802, decided 5/27/58 (1958-2, U.S.T.C., Par. 9589).

now Section 1221, I.R.C., 1954), that the confusion and inconsistencies existing in the application of this statute to subdivision lots and real property in other forms by decisions of the Courts of Appeals and other federal courts, be clarified by a decision of this court.

IV.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT.

For the reasons set forth in paragraph I hereof, we believe that the decision of the Court of Appeals in this case is in conflict with the decisions of this court concerning the power of the Court of Appeals to review findings of fact and in the application of Rule 52(a), F.R.C.P., supra, to such reviews.

* * *

Finally, we wish to point out that at the time of the oral argument before the Court of Appeals, government counsel was permitted to argue for a full forty-five minutes, but when counsel for petitioners commenced his argument and after making some introductory and preliminary remarks for approximately twelve minutes, discontinued his oral argument at the suggestion of the Court of Appeals, the court suggesting to counsel that it would not be necessary to continue his argument as apparently the points to be presented were included in the brief, though counsel could continue if he wished. Accordingly, in deference to the court's suggestion, counsel for petitioners discontinued his oral argument after

making some introductory and preliminary remarks but before getting into the core of the argument, and thus arrived at the conclusion, though evidently erroneous, that it would not be necessary to make oral argument on behalf of the petitioners. This being the case, and a question of fact involved, we sincerely believe that full oral argument on behalf of the petitioners was important to their cause before the Court of Appeals and that they were entitled to full oral argument on their behalf.

CONCLUSION.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit should be granted.

Dated, Modesto, California,
September 4, 1958.

CARLOS J. BADGER,
Counsel of Record for Petitioners.

EDWARD M. LACY,
ROBERT C. BIENVENU,
FRANCIS O. HOOVER,
Of Counsel for Petitioners.

(Appendices A, B and C Follow.)

Appendix A

In the United States District Court
In and For the Northern District of California,
Northern Division

Civil Nos. 6942 and 7270

JOHN B. BEARD and HELEN B. BEARD,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JOHN B. BEARD and HELEN B. BEARD,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT IN CONSOLIDATED CASES

The above-entitled actions came on regularly for trial on April 10, 1956, before the Court sitting without a jury. Honorable Ernest A. Tolin presiding. The two actions having been consolidated for trial are now consolidated for judgment, it being the intention of the Court to enter one judgment as the total relief granted in both cases. Edward M. Lacy Esq., and Robert C. Bienvenu, Esq., appeared for plaintiffs, and

Lloyd H. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, appeared for defendant. Evidence having been introduced and the cause submitted for decision upon briefs, and the Court having made its findings of fact and conclusions of law,

Now, Therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid,

It is Hereby Ordered, Adjudged and Decreed that judgment be, and it is hereby, rendered in favor of plaintiffs and against defendant United States of America for $36,519.29 plus interest according to law: on $8,636.17 thereof from March 15, 1947; on $9,264.28 thereof from March 11, 1952; and on $18,618.84 thereof from March 23, 1953; together with plaintiffs' costs of suit in the sum of $.....

Dated: This 21st day of March, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge.

(Endorsed): Filed and entered March 25, 1957.

In the United States District Court
In and For the Northern District of California,
Northern Division

Civil Nos. 6942 and 7270

JOHN B. BEARD and HELEN B. BEARD,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.

JOHN B. BEARD and HELEN B. BEARD,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.

AMENDED JUDGMENT

Pursuant to the Stipulation of the parties hereto, and good cause appearing therefor, It is Hereby Ordered, that the final paragraph of the Judgment rendered herein on March 21, 1957, be and the same is hereby deleted and that there be sustituted in lieu thereof the following:

It is Hereby Ordered, Adjudged and Decreed that judgment be and it is hereby rendered in favor of plaintiffs and against defendant United States of America for $34,024.85, plus interest according to law: on $6,485.17 thereof from March 15, 1947; on $9,-

411.70 thereof from March 11, 1952; and on $18,127.98 thereof from March 23, 1953; together with plaintiffs' costs of suit in the sum of $.....

Dated: this 3rd day of April, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge.

(Endorsed): Filed May 6, 1957.

Entered May 7, 1957.

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* vs. JOHN B. BEARD and HELEN B. BEARD, *Appellees.*	No. 15,560 May 26, 1958

Appeal from the United States District Court for the Northern District of California, Northern Division

---

Before: ORR, FEE and CHAMBERS, CIRCUIT JUDGES

ORR, CIRCUIT JUDGE:

Contending that certain income realized by appellee Beard, hereafter the taxpayer, was realized from sale of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," within the meaning of 1939 Internal Revenue Code § 117(a) (1), the Commissioner made deficiency assessments in the sum of $36,519.29 plus interest, for the taxable years 1946 through 1950.

Taxpayer paid the deficiencies and brought suit in the trial court for its recovery. Findings were made and judgment entered in favor of appellees. In disposing of the questions posed on this appeal we are confronted solely with a question of fact "which ordi-

narily is governed by the findings of the Trial Court unless these are clearly erroneous or unless an appellate court is convinced by an examination of the entire record that a mistake has been committed." *Bistline v. United States*, 9th Cir., No. 15,716, decided May 13, 1958. "Cases of this character present difficulties because there is no agreement among the courts as to what primary element in the transaction determines its character." *Pool v. Comm'r*, 251 F.2d 233, 235 (9th Cir. 1957).

We turn now to a statement and consideration of the facts. Taxpayer's forbears located in Modesto, California in 1850 and some of the descendants have since engaged in large farming operations, as well as branching out into other allied businesses in the area.

The Beard family group now consists of 10 brothers and sisters, each of whom is a 10% stockholder and director in each of seven family corporations. In 1950 these companies included: the Beard Land and Investment Company (hereafter L&I), a family holding company which also conducts extensive farming and business property operations; a short-line railroad; an ice, fuel and appliance business; a farming enterprise; a large public utility water company; and the Modesto Refrigerating Company, a large cold storage and quick freezing concern.

Taxpayer was president and general manager of the refrigerating company from 1926 until its sale in 1953. The concern had an ice making and car-icing facility, sold ice to consumers and to packers for pre-

cooling, had a quick-freeze plant for fruit, vegetables and turkeys with a 300,000 lb. daily capacity, and a cold storage warehouse with custom freezing for packers which had a storage capacity of 600 car loads. The family investment in the company was almost doubled by expansion of the plants in 1946 and in 1949-1950 a further increase of $300,000 to $400,000 was made, resulting in a total investment of nearly $2,000,000. By 1950, the last tax year in question here, gross sales were over $1,000,000. Depending upon the time of year, the concern employed from 75 to 125 workers, all of whom were under active supervision of taxpayer.

The five years 1946-1950 were those in which the greatest growth occurred in all the family concerns. Three brothers were the active heads of all the businesses, with the other owners taking little active part in the operations. In addition to his job at the refrigerating company, taxpayer had over-all supervision of City Ice and Fuel Company, and he occasionally dropped in on other family businesses, particularly the railroad. He had no other office than the one at the refrigerating company, and customarily was there from 8 or 8:30 to 5:30 or 6 "with getting out during the day." He testified that he spent something like one to five per cent of his time on his real estate properties, but this time came "somewhere out of a 24 hour day."

A summary of taxpayer's real estate activities and interests follows:

In 1932 taxpayer made his first purchase of land which was later subdivided, the 12 acre Las Palmas tract of 40 lots. By 1936 the city limits ran along one edge of the tract. The first sales were made in 1936 or 1937 and at that time an adjacent tract was also for sale by others. Sales by taxpayer were handled through a Mr. Hopkins, a real estate agent, and he sold 30 lots by 1941, all but two of the 40 being sold by that time.

The first tract purchased by taxpayer which produced income during the taxable years now in question was the Wilson No. 1 tract of 25 acres, adjacent to Las Palmas and 600 feet from the city limits at the time of purchase in 1937. It had been platted for subdivision by the former owners in 1924. Taxpayer had a 50% interest in the property, with two of his sisters. The first sale of a lot was within a year of acquisition, in 1938, and the last was in 1948. Hopkins again was the exclusive agent on a commission basis until 1942, but taxpayer sold a few lots himself to close friends without any solicitation on his part. Taxpayer had nothing to do with Hopkins' sales other than to sign the deeds, but admitted he had discussions with him about ideas to carry on sales and during 1941-1942 even helped him out on some of the advertising. There were no sales during the war and in 1945 L&I began handling the property. Taxpayer built four houses on this tract in 1940 and all were sold by 1942, some being sold by himself.

In 1939, a year after acquiring Wilson No. 1, taxpayer began buying the farms which made up Wilson

No. 2, again taking a 50% interest with two sisters. Other developments were opening up near-by at the time, and taxpayer personally secured the three government permits and subdivided the tract in 1940. Roads were put in by L&I and water was put in by the family water company. In 1940 and 1941 taxpayer built 5 houses on this tract and sold all of them by 1942, either himself or through his brokers. As with Wilson No. 1, Hopkins was the sales agent until 1942, with taxpayer making a few sales at that time himself. Hopkins made all the contracts and handled all the details of sales he made. In 1945 L&I became the exclusive sales agent and thereafter, taxpayer testified, he had nothing to do with the operation as to advertising, soliciting or making improvements.

The third tract from which sales were made in the period in question was Thousand Oaks, a 44 acre tract taxpayer acquired for himself in 1940. Taxpayer filed the original subdivision map himself. "I done a little preliminary work on it there in 1941 with the idea of going ahead and developing part of it and then had decided to do nothing with it and just let it set there." The tract was divided into 93 lots, and some street work was done and some of the curbs put in by taxpayer directly. L&I handled improvements after 1945 and all lots were sold by L&I between 1946 and 1950.

The 58 acre Covena Park property was purchased in 1940 and 1941. The development was a large overall subdivision put together by L&I from this and other tracts not owned by taxpayer's family. L&I prepared the necessary legal papers for subdividing,

put in all the improvements under its own supervision and made all sales. Taxpayer signed the deeds and L&I deducted expenses from the monthly payments on account to taxpayer. All the 104 lots in this tract were sold quickly, during the 1946-1948 period.

A small area between other tracts already owned by taxpayer, known as Wilson No. 3, was eventually divided into 45 lots. Eight acres were acquired in 1941 and two additional acres to round out the tract were acquired in 1946. Taxpayer held a 50% interest in the property, again with two sisters. When acquired in 1941, the land was probably the closest property to Modesto still available for subdivision. L&I was made the exclusive sales agent in 1945. It put in the streets and the family water company put in the water. Sales began in 1946 and all lots were sold by the end of the year.

The final purchases made by taxpayer during the years in question were in the Alta Vista tract. In 1945 two ranches beyond Covena Park were offered by their owners to L&I. Taxpayer testified that L&I "didn't care to buy it and it was decided—a group of us got together and decided to buy it as individuals." The properties were taken by taxpayer as trustee for a group of seven brothers and sisters, each owning one-seventh. A third ranch of 10 acres was similarly acquired in 1946, making a total of 68 acres ultimately divided up into 215 lots. The sale of lots began in 1946 under L&I direction and most were sold within a two year period: 112 in 1949, and 92 in 1950 (the government figures, secured from the county land records were 147 and 115 for each year, respectively).

Sale of this property "was very rapid" and only one sale was made after 1950.

After the war, L&I was made the exclusive agent for development and sale of the various properties in which taxpayer had an interest. A fully executed agreement with L&I was introduced with respect to only one tract, the 10 acre Wilson No. 3 property. A copy of a similar agreement bearing only the signature of Walter Beard, president of L&I, was introduced with respect to the 28 acre Covena Park tract in which taxpayer had an interest with this same brother and two sisters. A similar, but undated and unsigned, copy of an agreement was introduced with respect to the 44 acre Thousand Oaks tract owned by taxpayer. No written agreements were introduced for Wilson No. 1 or Wilson No. 2, tracts totalling 47 acres, and none were produced for the Alta Vista trust properties which totalled 68 acres. All agreements that were made were prepared by taxpayer's attorney, the husband of the sister of taxpayer who was secretary of L&I. In the usual agreement L&I was made the exclusive sales agent for five years at a specified commission rate but with the owners retaining power to make sales themselves. Prices were to be fixed by agreement between the owners and L&I, and L&I was to supervise development, deducting its expenses from the monthly remittances to the owners. L&I was to bear the expense of advertising, solicitation and collection.

During the time in question, Walter Beard, president of L&I, had a broker's license and the company

operated a real estate department at a separate office in Modesto. It "never ran what I [taxpayer] would say was a very active office," but employed two to four salesmen under direction of a manager, Clyde Oden. According to taxpayer, the office was set up primarily to handle company-owned properties and other properties not owned by taxpayer which the company was selling as exclusive agent. The manager testified that taxpayer's properties were "a very minor part" of the office's operations.

L&I was employed as taxpayer's agent, taxpayer testified, because it was in a position to render a more complete service than any other local agent and it was the most convenient method. The possible profit to L&I, which would eventually accrue in part to taxpayer as a stockholder, was not a consideration because it was "such a minor thing." Nor, according to taxpayer, was L&I retained because of taxpayer's ability to control its activities as a director, since he testified that his only control was exercised through his interest as owner of the properties. L&I's board of directors met monthly, but taxpayer recalled no discussion of sales of his properties at those meetings. He admitted that following the meetings on occasion the members of the Trust Group which owned the Alta Vista tracts discussed the affairs of their group.

Taxpayer recalled no specific discussions with L&I on how to promote the property, other than those which just developed in the normal course of an agent-owner relationship—very little discussion on sales or method of handling. He did admit that he asked ques-

tions and made suggestions on how the properties should be advertised or promoted. The manager of the office testified that he talked to taxpayer very infrequently, possibly four or five times a year in taxpayer's office when he was there to have deeds signed. Taxpayer was always interested in what progress was being made and what steps were being taken, but never came to the realty office itself.

Taxpayer estimated that Modesto's population was around 15,000 in 1941 and about 60,000 at the time of trial, the greatest growth having taken place during the years in question, since 1945. The area of taxpayer's properties was a natural place for subdivision and well adaptable for that purpose. Taxpayer stated that it was not more adaptable than other places around Modesto, though, and that other areas developed at a far faster rate.

According to the government's figures, derived from the county records, 558 lots in which taxpayer held an interest were transferred during the five years in question, the totals for each year being successively, 97, 100, 49, 174, and 138, for the period 1946-1950. Gross sales of real estate in which taxpayer had an interest were:

1946	$95,347.16
1947	62,817.85
1948	54,219.45
1949	148,501.40
1950	125,094.98
Total	$485,980.84

In all but one of the five years in question, taxpayer's income from these realty operations was substantially higher than his salary as head of the refrigerating company. Income from real estate operations totalled $126,725.25. His total salary and other non-realty income for these same years was $85,905.20.

It is apparent from the foregoing that taxpayer's interest in the real estate business was large, and it is equally clear that the tracts of land purchased and subdivided were "property held by the taxpayer primarily for sale to customers . . ." The crucial question presented in the case is whether the holding was for sale "in the ordinary course of his [taxpayer's] business." The trial court found that it was not. In this we think the trial court was clearly in error and that a mistake has been committed.

In order to come within the meaning of trade or business, the purchase and sale of real estate need not be the sole business of a taxpayer. Taxpayer had a large variety of interests in which he was a moving and guiding spirit. The over-all picture of the "family enterprises" and taxpayer's association therewith convinces us that the purchase, subdividing, and sale of real estate was sufficiently extensive to bring his activity within the definition of the statute.

While adhering to the rule that each case must be decided upon its particular facts, certain cases decided by this Court are somewhat persuasive. See *Bistline v. United States*, 9th Cir., No. 15,716, decided May 13, 1958; *Pool v. Comm'r*, 251 F.2d 233 (9th Cir. 1957);

Achong v. Comm'r, 246 F.2d 445 (9th Cir. 1957); *Stockton Harbor Indus. Co. v. Comm'r*, 216 F.2d 638 (9th Cir. 1954); *Richards v. Comm'r*, 81 F.2d 369 (9th Cir. 1936). And see *Fowler v. United States*, 154 F. Supp. 859 N.D. Ohio 1957).

Reversed.

(Endorsed:) Opinion. Filed May 26, 1958.
Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 15,560

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN B. BEARD and HELEN B. BEARD,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed.

(Endorsed) Judgment. Filed and entered May 26, 1958. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, July 8, 1958.
Before: Orr, Fee and Chambers, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellees, filed June 23, 1958, and within time allowed therefor by rule of court for a rehearing of the above cause, and for a rehearing en banc, be, and hereby is denied.

Appendix B

Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C.A.

52. *Findings by the Court*—(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

United States Treasury Department Income Tax Regulations, Sec. 1.237-1(a)(4)—T.D. 6247 (8/13/57).

1.1237-1(a)(4). *Section 1237 not exclusive.* (i) The rule in section 1237 is not exclusive in its application. Section 1237 has no application in determining whether or not real property is held by a taxpayer primarily for sale in his business if any requirement under the section is not met. Also, even though the conditions of section 1237 are met, the rules of section 1237 are not applicable if without regard to section 1237 the real property sold would not have been considered real property held primarily for sale to customers in the ordinary course of his business. Thus, the district director may at all times conclude from convincing evidence that the taxpayer held the real property solely as an investment. Furthermore, whether or not the conditions of section 1237 are met, the section has no application to losses realized upon the sale of realty from subdivided property.

(26 C.F.R.—Part 1-19—Revised 1-1-58, Section 1.1237-1(a)(4).)

Appendix C

In the District Court of the United States for the Northern District of California, Northern Division

Nos. 6942 and 7270

Before Hon. Ernest Tolin, Judge.

Endorsed: Filed Aug. 11, 1958, C. W. Calbreath, Clerk.

JOHN B. BEARD and HELEN BEARD,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

REPORTER'S TRANSCRIPT

DISCUSSION BETWEEN COURT AND COUNSEL AFTER CLOSE OF TESTIMONY

Wednesday, April 11, 1956

APPEARANCES:

For the Plaintiffs:
Edward M. Lacy, Esq., and
Robert Bienvenu, Esq.,
(Hoover, Lacy & Bienvenu),
1024 J Street, Modesto.

For the Defendant:
Lynn J. Gillard, Esq.,
Assistant U. S. Attorney,
Post Office Building,
San Francisco, California.

(Book 1249, p. 93 of notes—April 11, 1956—following close of testimony.)

The Court: It appeared to me—I might be wrong about—that there is not any great dispute here as to the law, but that the dispute is as to the facts.

Now before I hear the motion which is set for three I would just like to kind of recap a little of what I think the law is, and then if you gentlemen are in agreement, you can take your recess while I hear the motion in the other case, and then come back and argue the facts. If we are not in agreement as to what the law is that applies, then I am afraid we will have to have briefs.

I think that the applicable law, perhaps with some change of citations because of newer editions, is basically set forth in a few cases that I have taken from among the great number of cases that deal with

this subject: The first one is Fahs against Crawford, 161 Fed. 2d, at 315, where it is said that

> "Section 117 of the Internal Revenue Code provides that the term 'capital assets' means property held by the taxpayer, but does not include property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. To fall within the excluded category, the property must not only be held by the taxpayer primarily for sale to customers, but it also must be for sale in the ordinary course of his trade or business.
>
> "Of course, a person may be engaged in more than one business, and may carry on his business through others. Carrying on a business, however, implies an occupation or undertaking to which one habitually devotes time, attention or effort with substantial regularity.
>
> "Merely disposing of investment assets at intermittent intervals, without more, is not engaging in business, even though some preliminary effort is necessary to render the asset saleable."

Then I referred earlier in the day to what I think is the leading case in this circuit, Commissioner of Internal Revenue against Boeing——

Mr. Gillard: May I have that first citation again, your Honor?

The Court: Yes. The light isn't too good in here; neither are the acoustics. It looks like 161 Fed. 2d 315. Will you look at it, Mr. Clerk, and see if that is right.

The Clerk: 161 Fed. 2d, 315.

Mr. Gillard: Thank you, your Honor.

The Court: Then in Commissioner of Internal Revenue against Boeing, 106 Fed. 2d, at 305, it is stated:

> "From the cases it would appear that the facts necessary to create the status of one engaged in a trade or business revolve largely around the frequency or continuity of the transactions claimed to result in a business status. This court, in determining whether or not the activities of the taxpayer in an investment field were such as to put him in a trade or business within the meaning of the deduction provisions of the Revenue Act, said: 'Other cases have recognized that though the taxpayer takes no part in the enterprises as to which he is an investor, he may nonetheless be considered to be carrying on a business if the transactions concerning his investments are substantial and frequent as distinguished from occasional or isolated.' "

Then we have the other case to which I have already referred, which I like best, perhaps because it is in larger print, but I think that it states things in a very understandable way,—that is Smith against Dunn, 224 Federal 2d, at 353:

> "The ingredients of the tests as evolved and defined in our decisions are these:
>
> "What was the nature and character of the taxpayer's title to the property, the reason, purpose and intent of the acquisition and ownership and the period of its duration; and whether the property was held primarily for investment or as a

part of the taxpayer's stock in trade as property bought, held and sold for profit.

"What was the vocation of the taxpayer at the time of the sale and prior thereto, whether a real estate broker or engaged in some similar or allied business, having in mind that he may have more than one business; and considering whether the taxpayer maintained only one office and that for his main vocation, and whether his engagement in the additional business was separable from his investment in the property?

"What was the extent of the taxpayer's activity and business, and whether the additional business was an occupational undertaking to which he habitually devoted time, attention or effort with substantial regularity; and, if the activities were conducted through a representative, whether those activities were carried on by the representative as a part of his own business and at his own expense, or primarily in behalf of the taxpayer, and particularly the character and degree of supervision or control exercised by the taxpayer over the representative?

"What were the extent and nature of the efforts to sell the property with the view of determining whether, in their fundamental aspects, these efforts amounted merely to rendering the investment assets more attractive and hence more saleable or to an engaging in the business of developing unimproved real estate for income-producing purposes? In making this determination it is proper to consider the number, extent, continuity and substantiality of sales, and whether such sales were in the ordinary course of the tax-

payer's business or were carried on independently of the taxpayer's business; the extent of subdividing, developing and advertising to increase sales, and the pressure exerted upon prospective purchases, and whether those activities smacked more of a legitimate liquidation of capital assets or active sales promotion for profit, having in mind that the mere fact of liquidation or the intent of the taxpayer alone are not determinative."

Now from those three cases we get rather one basic set of guides, and if you gentlemen are of the same view we will just have that much settled in the case; if you are not I will be happy to have you correct me.

Can you tell me now if you think I am right, or do I need correction?

Mr. Gillard: I have not read the Smith vs. Dunn case, if your Honor please, but the more I heard you read just now, I would say that the criteria and the cases laid down in that case is inconsistent with the position taken in the 9th Circuit.

The Court: It is a little broader.

Mr. Gillard: I would say it is quite a bit broader, if the Court please. The 9th Circuit, contrary to what Smith vs. Dunn says, indicates quite clearly that sales through a broker make the business nonetheless that of the taxpayer, and that is the Burns case, the Herman case, which I have already cited——

The Court: I had not intended to go as far as Smith against Dunn there.

Mr. Gillard: I will say that the 9th Circuit seems to be very clear that the original intention of the

taxpayer at the time of purchasing the property is not controlling at all, and, as a matter of fact, they give it very little weight in the 9th Circuit.

The Court: Smith against Dunn says it is not controlling, although it is one of the factors——

Mr. Gillard: I don't think the 9th Circuit even considers it.

The Court: Do you want to brief this case, then?

Mr. Gillard: From what the Court has said with reference to the activities of the taxpayer in connection with it, whether it is part of his business, whether he had other business activities, what part he takes in directing the broker and those things, if those are in the Court's mind, as controlling or even as being influential in this case, I think I prefer to brief it, because I think the 9th Circuit doesn't go that far; they seem to lean almost exclusively on the fact that merely from a picture of the nature of the activities in connection with the sale of the property itself, judge it almost exclusively from the frequency and continuity of those sales, and they will not let the taxpayer divorce himself from those agents that he hires to do his work.

The Court: I did not think that Smith against Dunn was in violent opposition, but perhaps relaxed the rules a little more than the Boeing case. But since we are not apparently all seeing the law exactly alike we better have it briefed and take a little time.

Mr. Gillard: Whatever your Honor says. I don't know exactly how you would like to approach this problem.

The Court: I have found that in many of these cases there is no disagreement as to the legal yardstick which the Court is to use, and that the dispute is factual. If we can settle the case as being in that type I would like to then proceed to have argument on the facts and avoid counsel having the labor of briefing or the Judge the labor of trying to retain in memory for a long time, which happens when you get too many submitted cases.

But if you don't think the cases from which I have read, taken as a whole here, the three cases, accurately state the yardstick, I think we better have it briefed.

Mr. Gillard: I think I have indicated to the Court, and probably the Court agrees with me, that the 9th Circuit cases are quite a bit more circumscribed than as indicated in Smith vs. Dunn and that DeVaule case, and I assume that as long as there are cases that are pretty fairly in point in the 9th Circuit, that they would be the controlling situation.

I don't think there is a great deal of dispute in this case as to what the facts are. As a matter of fact, a great deal of the case that I thought I was going to have to develop on cross-examination was produced by the plaintiffs on direct examination, and the case as now in before the Court is, as far as I know, the actual situation.

Mr. Beard is a very fair witness and an unusually frank man and he has not in any way tried to deceive or cover up or gloss any of the facts as far as I know them to be.

And I think the Court has had a pretty fair presentation of what the facts are, and, as far as I know, there is no substantial dispute as to what those facts are.

The Court: It is a question of adding them up.

Mr. Gillard. I think so.

The Court: Well, it has been an extraordinarily pleasant tax case. I have had a terrific number of them that involved not as many facts, but they get developed through stipulations and counsel form questions and answers so we try the whole case in 30 minutes. That usually leaves the Judge quite confused, and I find out the full and detailed story on motion for new trial, which is a poor time to learn it. But you have been very thorough, both sides here, and I appreciate it.

Mr. Gillard: Well, would the Court like some oral argument after the recess?

The Court: What does the plaintiff think of this?

Mr. Lacy: Well, your Honor——

The Court: Do you want to argue or brief, or both?

Mr. Lacy: Well, I think that I would like to do both, your Honor. This is a serious matter for us, and I agree in part with the Court as to the law, particularly in Smith vs. Dunn and in Fahs vs. Crawford.

The Court: Of course, those were the most liberal.

Mr. Lacy: I haven't read Boeing v. Commissioner, but from what your Honor said it seems to stress the fact that the taxpayer could be considered as being in business though he was inactive, and that is our whole case. Our whole case is that the man was inactive

and passive, and I have authorities from other jurisdictions or other circuits that state that one of the most important tests is the activity of a taxpayer.

The Court: I would like to read those, then. As I note, your Exhibits 2, 3 and 4 have a series of paragraphs, 13 through 16, which delegate the activity pretty substantially to the agent, even down to a large measure of control, and I think that perhaps we had better have briefs. But I will hear my three o'clock case, it being 25 minutes after that hour, and then you can come back and argue briefly this afternoon.

Mr. Gillard: Before we close may I ask for the withdrawal of Exhibit B for Identification —

The Court: Yes.

Mr. Gillard: —the original tax returns?

The Court: Yes.

Mr. Gillard: Thank you.

The Court: Do you want to start argument, say, at four o'clock and each side take a few minutes, because you can't do more than comment on a few highlights today, and then you can settle a time within which to file briefs.

Mr. Gillard: Fifteen or twenty minutes to each side?

The Court: Fifteen minutes to each side, beginning at four o'clock.

(Thereupon the further hearing of this matter was continued to four o'clock P.M. this date.)

Certificate of Reporter

I, Clarence F. Wight, Official Reporter, certify that the foregoing, pages 1-11, is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

Clarence F. Wight.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. Calbreath,
Clerk, U. S. District Court,
Northern District of California,
B. C. V. Everson,
Deputy Clerk.